UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/533,477	04/29/2005	Brent Daniel Rogers	6682-66959-02	4053

46395 7590 11/25/2008

CARGILL, INCORPORATED
LAW DEPARTMENT
P. O. BOX 5624
MINNEAPOLIS, MN 55440-5624

EXAMINER	
ZAREK, PAUL E	

ART UNIT	PAPER NUMBER
1617	

MAIL DATE	DELIVERY MODE
11/25/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/533,477	ROGERS ET AL.	
	Examiner	Art Unit	
	Paul Zarek	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *21 October 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) *8-20* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *See Continuation Sheet*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Continuation of Attachment(s) 3). Information Disclosure Statement(s) (PTO/SB/08), Paper No(s)/Mail Date :04/29/2005, 12/20/2005, 02/01/2006, 06/14/2007, 06/14/2007, 07/27/2007, 08/04/2008.

DETAILED ACTION

Status of the Claims

1. Claims 1-20 are currently pending. This is the first Office Action on the merits of the claim(s).

Election/Restrictions

2. Applicant's election without traverse of Group I, drawn to a food composition in the reply filed on 10/21/2008 is acknowledged. Claims 1-7 read on the elected group. Claims 8-20 are withdrawn as being drawn to a nonelected group.

Priority

3. Applicant's claim for the benefit of a prior-filed international application (US03/34668, filed on 10/31/2003) which claims the benefit of a US provisional application 60/423,119 (filed on 11/01/2002) under 35 U.S.C. 119(e) or under 35 U.S.C. 120, 121, or 365(c) is acknowledged. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 120 as follows: the US provisional application 60/423,119 does not provide 35 U.S.C. 112 first paragraph support for the instant application. The instant claims are drawn to a food composition comprising at least one baked component and at least one heat-processed component. The instant specification defines "heat-processed" as food products exposed briefly to high temperatures (pg 5, lines 6-7). Applicants provide non-limiting examples of "high temperature," all of which are above 160 °F (pg 6, lines 1-14). The '119 provisional

application contains one example (Example 1) wherein the food composition is Rice Krispie® Treats. The Rice Krispies® represent the baked component, and the melted marshmallow represent the heat-processed component. Glucosamine (GLCN) or N-acetyl-D-glucosamine (NAG) is added to the melted marshmallow. The Example states that "[i]n this experiment, the samples were not heated to high temperatures" (pg 12, lines 22-23). Since the instant claims require the GLCN or NAG to be in the heat-processed component, and there were no high temperatures used in the '119 provisional application (i.e. the GLCN or NAG was not heat-processed), the '119 provisional application does not provide support for the instant application.

4. Applicant's claim for the benefit of a prior-filed application 10/685,125 (filed on 10/13/2003), which is a CIP of application 10/326,549 (filed on 12/19/2002), which is a CIP of application 09/785,695 (filed on 02/16/2001) under 35 U.S.C. 119(e) or under 35 U.S.C. 120, 121, or 365(c) is acknowledged. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 120 as follows: the prior-filed applications do not provide 35 U.S.C. 112 first paragraph support for the instant application. The instant claims are drawn to a food composition comprising at least one baked component and at least one heat-processed component. The prior-filed applications are all drawn to a method of isolating GLCN from fungal biomass. The examples of food products do not include a composition comprising a least one baked component and at least one heat-processed component comprising GLCN or NAG.

5. The effective filing date of the instant application is 10/31/2003.

Claim Rejections - 35 USC § 112 (2nd paragraph)

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The instant claims recite a limitation of "at least about" (i.e. "at least about 70%" Claim 1). It is unclear the metes and bounds of such a phrase. For example, "at least 70%" is interpreted to include a concentration that is 70% or higher. 90% meets this limitation, whereas 69% does not. "About 70%," however, is interpreted to include percentages that approximate 70%, such as 69% and 71%. It is unclear whether 90% (which is at least 70%, but not about 70%) or 69% (which is about 70%, but not at least 70%) would meet the limitation of "at least about 70%" as recited in Claim 1. Therefore, the instant claims are considered indefinite. Applicant can overcome this rejection by removing either "at least" or "about" from the phrase "at least about" in Claims 1 and 3-7.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any

evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kern and Heisey (International Application No. WO 01/93847, provided in IDS) in view of Gunter (The Ultimate Southern Living Cookbook, 1999).

11. Claim 1 of the instant application is drawn to a food composition comprising at least one baked component and at least one heat-processed component which comprises GLCN, NAG, or a combination of the two. Claim 1 further limits the heat-processed component such that said component retains at least about 70% of the GLCN and/or NAG that was present in this component prior to heat processing. Claim 2 further limits the heat-processed component to coatings, glazes, cake and pie fillings, agglomerating material, frosting, or mixtures thereof. Claims 3-5 limit the heat-processed component to be heated to at least 160 °F, 170 °F, or 180 °F, respectively. Claims 6 and 7 limit the composition such that the heat-processed component retains at least about 80% or 90%, respectively, of the GLCN or NAG following heat processing.

12. Kern and Heisey teach a glaze comprising glucosamine HCl. Kern and Heisey do not teach that the glaze be heat-processed, nor as part of a food composition comprising at least one baked component. However, glazes are well known, and one of ordinary skill in the art would have known to add the glaze to a baked component, such as a cake. Moreover, heating the components of a glaze is a well-known technique. Gunter teaches that glazes can be added to cakes (pg 132, paragraph 1) and discloses heating the components of a glaze over medium heat.

One of ordinary skill would reasonably conclude medium heat to be a temperature at which water would not boil (212 °F). Therefore, "medium heat" reasonably encompasses 180 °F.

13. Claim 1 provides the limitation that the heat-processed component retains at least about 70% of the GLCN or NAG that was present prior to heat processing. Given the generic nature of the heat processing step recited, Examiner interprets the amount of GLCN or NAG remaining following "heat processing" (i.e. heating over medium heat) is inherent to GLCN or NAG. As such, the wherein clause of Claims 1, 6, and 7 is not afforded any patentable weight. "A whereby clause in a method claim is not given weight when it simply expresses the intended result of a process step positively recited" *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1329, 74 USPQ2d 1481, 1483 (Fed. Cir. 2005) (MPEP § 211.04[R-3]). Although the instant claims are not method claims, the compositions claim an element that depends upon the process by which it was made.

14. Therefore, it would have been *prima facie* obvious to one of ordinary skill in the art to combine the teachings of Kern and Heisey (providing GLCN or NAG in a glaze) with those of Gunter (to heat a glaze during its manufacture and to place it on a baked good, such as a cake) to make a food composition comprising at least one baked component and at least one heat-processed component.

Conclusion

15. No claims are allowed.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Paul Zarek whose telephone number is (571) 270-5754. The examiner can normally be reached on Monday-Thursday, 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

PEZ

/Rita J. Desai/
Primary Examiner, Art Unit 1625